

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
BRIEF**

77-1384

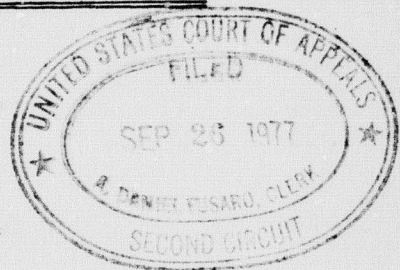
IN THE
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

DOCKET NO. 77-1384

IN THE MATTER OF:
THOMAS A. LIBERATORE

ON APPEAL FROM THE SUBSTITUTE ORDER OF THE
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CONNECTICUT

BRIEF FOR
THOMAS A. LIBERATORE



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PRELIMINARY STATEMENT

This case involves an appeal from a Substitute Order of the United States District Court for the District of Connecticut. The Substitute Order declares Thomas A. Liberatore, a witness before a Grand Jury in Hartford, Connecticut, to be in Contempt of Court, commits him to the custody of the Attorney General of the United States, and orders that this commitment shall interrupt any credit received by him on a state sentence he was serving at the time the allegedly contemptuous behavior occurred. The Substitute Order, signed by Chief Judge T. Emmet Clarie, is unreported, and appears at A. 29-30.

The jurisdiction of this Court rests on 28 U.S.C.

§ 1291, the Substitute Order being a final decision of the District Court. The Substitute Order is dated August 2, 1977. The notice of appeal was filed August 24, 1977.

STATEMENT OF THE ISSUES PRESENTED

I. Did the District Court have the authority to order that Liberatore's commitment shall interrupt any credit received on his state sentence?

II. Was Liberatore given the Due Process safeguards of notice and opportunity to prepare a defense that are required by Fed. R. Crim. P. 42 and the Fifth and Sixth Amendments to the Constitution of the United States?

III. Did the United States demonstrate the necessity and relevancy for the fingerprints and handwriting exemplars sought by the Grand Jury?

STATUTE INVOLVED

This case involves the "recalcitrant witness" statute, 28 U.S.C. § 1826(a), which provides that:

Whenever a witness in any proceeding before or ancillary to any court or grand jury of the United States refuses without just cause shown to comply with an order of the court to testify or provide other information, including any book, paper, document, record, recording or other material, the court, upon such refusal, or when such refusal is duly brought to its attention, may summarily order his confinement at a suitable place until such time as the witness is willing to give such testimony or provide such information. No period of such con-

finement shall exceed the life of--

(1) the court proceeding, or

(2) the term of the grand jury, including extensions,

before which such refusal to comply with the court order occurred, but in no event shall such confinement exceed eighteen months.

STATEMENT OF THE CASE

Liberatore's State Sentence

On September 15, 1976, Thomas A. Liberatore, having been found guilty of six criminal offenses, was sentenced by the Court of Common Pleas of the State of Connecticut, Geographical Area No. 1 at Stamford, to two consecutive one year sentences. (A.6-7.). He was delivered into the custody of Connecticut's Commissioner of Correction on the same day and remained continuously and exclusively in such custody until the time of the events in question. Assuming that Liberatore were to earn all the "good conduct time" to which he is entitled under Conn. Gen. Stat. § 18-7, he would have been released from state custody in January 1978. (A. 7,19.)

The Contemptuous Behavior

On June 29, 1977, Liberatore was brought by a writ of habeas corpus ad testificandum before the Federal Grand Jury sitting in Hartford, Connecticut, which is inquiring into possible violations of Federal criminal statutes, including 18 U.S.C. § § 495 (forgery and uttering) and 1708 (possession

of stolen mail). Acting with advice of counsel, he refused to give certain handwriting samples and "major case" prints (fingerprints and palmprints) requested by the Grand Jury.

The Honorable T. Emmet Clarie, Chief Judge of the United States District Court for the District of Connecticut, then ordered Liberatore to provide such samples and prints to the Grand Jury. (A 27.) The Court's Order was based on an Affidavit of Assistant United States Attorney Thomas P. Smith. (A. 25-26.) Liberatore, however, refused to comply with the Court's order.

The Court's Order of Contempt

Later on the same day, the United States Attorney petitioned the Court to hold Liberatore in contempt. After the Court inquired of Liberatore whether he indeed had refused to comply with its Order, it summarily entered a Judgement holding him in Contempt of Court. It further ordered:

that he be committed to the custody of the Attorney General of the United States, with the recommendation that he be permitted to serve this sentence at a state institution, for the remainder of the term of the Grand Jury before which he appeared, said term to expire on April 13, 1978, or until the said THOMAS A. LIBERATORE shall purge himself of this Contempt by providing major case fingerprints and handwriting samples.

(A. 28.)

The Court's Substitute Order

The court had announced orally on June 29, 1977, its intention that Liberatore's state sentence should be inter-

rupted. Appellant submitted a brief in opposition to this term of the order, but on August 2, the Court entered a Substitute Order. This Order repeats the Order of June 29, but adds:

It is the further judgement of this Court that the commitment herewith ordered shall, as of June 29, 1977, interrupt any credit received by the said THOMAS A. LIBERATORE on his sentence of September 16, 1976, to a two-year definite term imposed by the Court of Common Pleas for Geographical Area #1 at Stamford, and that credit on said sentence shall not resume until the commitment ordered under the judgement of this court shall expire.

(A. 30.)

SUMMARY OF ARGUMENT

(I) The Substitute Order, interrupting the service of a state sentence of unquestioned legality, is without discoverable precedent in our nation's history. It is authorized neither by statute nor by the inherent powers of the Federal Judiciary.

The most pertinent legislative provision is 28 U.S.C. § 1826 (a). This statute merely authorizes the court to order that a recalcitrant witness be "confined." Its text does not comprehend the interruption of a pre-existing sentence, which is something quite different from mere "confinement." When § 1826 (a) was enacted in 1970, moreover, it was intended to codify the then-existing law with respect to recalcitrant witnesses. The then-existing law,

however, did not allow the pre-existing sentence of contemner to be interrupted.

A Federal Court has no inherent power to interrupt the service of a lawful state sentence. A long line of Supreme Court decisions has made it clear beyond peradventure that when a state court has taken jurisdiction and sentenced a person to a lawful term of imprisonment, a Federal Court cannot subsequently interrupt the state court's jurisdiction by stopping the running of the prisoner's state time. It is a fundamental requirement of our Federal system and the dictation remains exclusive until the prisoner has been released from state custody.

(II) 28 U.S.C. § 1826(a) is a quasi-criminal statute. § 1826(a) hearings must comply with the notice requirements of Fed. R. Crim. P. 42(b). The District Court's summary procedure did not give Liberatore or his counsel an adequate opportunity to prepare.

(III) The bare allegations of the United States did not demonstrate the necessity and relevance of the prints and handwriting samples sought by the Grand Jury.

ARGUMENT

(I) THE DISTRICT COURT HAD NO AUTHORITY TO INTERRUPT LIBERATORE'S STATE SENTENCE.

This case, one without direct precedent in our country's jurisprudence, presents what might fairly be called a classic confrontation between immediate considerations of a highly practical nature and traditional notions of the limitations of the Federal judiciary that are an integral part of the rule of law. The practical considerations are obvious and, at first blush, compelling. The purpose of civil commitment for contempt is, of course, not to punish the contemner but to coerce his compliance with the Court's Order. Because Liberatore is already incarcerated, however, the District Court's original Order simply requiring his "confinement" would probably, at least until January 1978, have had little coercive impact -- although, as we shall argue, it would necessarily have some. The Substitute Order stopping the running of his state time, by comparison, provides a substantial incentive for Liberatore to purge himself of his contempt.

This consideration is mentioned at the outset in order to explain the tenor of our objections. We are not unmindful of the fact a decision invalidating the Substitute Order is likely, at the very least, to be unwelcome. We have, however, come to the conclusion that a Federal Court has no lawful

power to alter a state prisoner's sentence as the District Court has done in this case. This is not a convenient result. But the system of legal rules under which we live will, by its very nature, occasionally deny to courts efficient and seemingly desirable means of obtaining legitimate and laudable objectives. At such times -- and this is one -- it is necessary that the inconvenience be accepted with the knowledge that such restraints, unwelcome though they may be, are the indispensable means by which the balance and freedom of our Federal system are preserved. ^{1/}

^{1/} Professor Amsterdam has, in another context, expressed the precise dilemma presented in the instant case:

In the pans of judgement sit imponderable weights.

On the one hand is the recognition that restrictions upon means of law enforcement handicap society's capacity to deal with two of its most deeply disturbing problems: the fact and the fear of crime. ...On the other hand, it was Mr. Justice Frankfurter -- no watery sentimentalist -- who reminded us that ' [t]he history of liberty had largely been the history of observance of procedural safeguards.' And the history of the destruction of liberty, one might add, has largely been the history of the relaxation of those safeguards in the face of plausible-sounding governmental claims of a need to deal with widely frightening and emotion-freighted threats to the good order of society.

Amsterdam, Perspectives on the Fourth Amendment, 58 Minn. L. Rev. 349, 354 (1974).

A. The Substitute Order Has No Statutory Authority

1. 28 U.S.C. § 1826 (a).

The authority for the Substitute Order must either be found in some express statutory authorization or in the inherent powers of the Federal Judiciary. With all respect, the Order in question cannot be justified by any reasonable construction of any conceivably relevant statute.

The most pertinent legislative provision is, of course, the "recalcitrant witness" statute, 28 U.S.C. § 1826 (a). This statute, originally passed as Title III of the Organized Crime Control Act of 1970, 84 Stat. 922, provides Federal Courts with statutory authority to order the "confinement" of an uncooperative witness. Insofar as words have any meaning at all, there is no way to interpret this provision as authorizing a Court to stop the running of a pre-existing sentence. It simply allows the Court to order that a recalcitrant witness be "confined" -- i.e., imprisoned during the prescribed period of time. If that witness is already incarcerated, the statute gives the Court authority to see that his confinement continues uninterrupted -- ensuring, for example, that he remains imprisoned if his pre-existing conviction should be reversed on appeal. But an Order that the pre-existing sentence stop running is, manifestly, something quite different.

The language of § 1826(a) would be stretched beyond all reason by a decision that it somehow authorizes the Substitute Order, but it would be highly inappropriate to stretch it at all. The doctrine that penal statutes must be strictly and literally construed was well established at the time of Blackstone^{2/} and has remained vigorous from the earliest days of the Republic^{3/} to modern times.^{4/} § 1826(a) is, technically, a civil rather than a criminal statute. But insofar as it is used to authorize any period of imprisonment it is a penal statute for purposes of this doctrine. See W. La Fave & A. Scott, Handbook on Criminal Law 72 n. 19 (1972). The whole point of the doctrine is that a statute cannot be used to imprison a man -- an action, whether it be civil or criminal, that is surely one of the most decidedly awful actions that our society can devise -- unless it is crystal clear that the legislature that enacted the statute intended such a result to occur.^{5/}

^{2/} 1 W. Blackstone, Commentaries *88.

^{3/} Respublica v. Weidle, 2 Dall. 88, 90-91 (Pa. 1781).

^{4/} United States v. Halseth, 342 U.S. 277, 280 (1952); United States v. Baltimore & O.S.R.R., 222 U.S. 8, 13-14 (1911).

^{5/} Cf. Woodward v. Rogers, 344 F. Supp. 974, 982 n.18 (D.D.C. 1972), aff'd, 486 F.2d 1317 (D.C. Cir. 1973) ("Legislation which authorizes action encroaching on constitutional rights must

Even the most cursory reading of § 1826(a), moreover, indicates that it simply was not designed to cope with the problem of the already incarcerated witness.^{6/} In fact, it

be construed in the manner which affords the greatest protection for individual rights since it must be assumed 'that the law-makers intended to place no greater restraint on the citizen than was clearly and unmistakably intended by the language they used.'").

^{6/} A majority of the Supreme Court of the United States seems to have acknowledged this in United States v. Wilson, 421 U.S. 309 (1975). That case upheld a district court's imposition of a summary contempt punishment under Fed. R. Crim. P. 42(a). The contemnners in Wilson had previously been convicted of bank robbery in Federal court and were awaiting final sentencing at the time of their contempt. The district court punished their contempt by sentencing them to six months' imprisonment, consecutive to any sentence imposed for the bank robberies. The court noted in a footnote the statement in Shillitani v. United States, 384 U.S. 364, 371 n.9 (1966), that the trial judge should "first consider the feasibility of coercing testimony through the imposition of civil contempt." The Wilson court then noted "Here, of course, that admonition carries little weight because at the time they acted contemptuously both respondents were incarcerated due to their own guilty pleas. Under the circumstances here the threat of immediate confinement would have provided little incentive for them to testify. Contrast, Anglin v. Johnston, 504 F.2d 1165 (CA 7 1974), cert. denied, 420 U.S. 962 (1975)." 421 U.S. at 317 n.9. The "contrast" to Anglin v. Johnston, discussed in n.13 infra, is enigmatic at best, but the entire passage strongly indicates that § 1826(a) is simply inapplicable to an already incarcerated witness. A footnote in the concurring opinion by Justice Blackmun and Rehnquist stating that the service of the respondents' sentence could indeed have been interrupted, 421 U.S. at 321 n.2, is most noteworthy because seven members of the court chose not to adopt it. At most, the concurring opinion can only be taken as referring to a Federal Court's inherent power to alter the service of a Federal sentence.

seems to us a truism that there are some situations in which an application of that statute to stay the execution of a pre-existing sentence rather than simple "confine" would actually defeat the purpose behind its enactment. A man already "confined" under § 1826(a) for a previous contempt of court, for example, would obviously lose all incentive to purge himself of that contempt were his "confinement" to be interrupted by another confinement as the result of a subsequent contempt. To use a somewhat less bizarre hypothetical, a man serving a life sentence would not be substantially coerced by a threat to stop his time. These are, admittedly, extreme cases, but they serve to point out that § 1826(a) was formulated to give the Federal courts a specific tool to deal with a specific and limited kind of contemner, i.e., one who is not already incarcerated and will be coerced by the threat of "confinement" itself. To stop the running of a pre-existing criminal sentence is an altogether different act and must draw its jurisdiction from an altogether different source.

It is, in any event, reasonably clear that Congress in enacting § 1826(a) never actually envisioned a situation remotely like that in the instant case. The Organized Crime Control Act of 1970 was the subject of a lengthy report of

the House Judiciary Committee ^{7/} and was debated extensively on the floors of the House and Senate. Title III, which pertained to recalcitrant witnesses, received a substantial amount of attention in the course of its passage, but the problem of the already incarcerated recalcitrant witness was never mentioned. § 1826(a) was manifestly enacted to deal with the situation of the previously unincarcerated witness who would be coerced by the mere threat of "confinement" ^{8/} itself and could by compliance release himself from prison.

This conclusion is reinforced by the overwhelming legislative evidence that Title III was meant to codify the then existing law with respect to recalcitrant witnesses ^{9/} rather than to increase the power of the Federal judiciary. ^{10/}

^{7/} H.R. Rep. No. 91-1549, 91st Cong., 2d Sess., reprinted in [1970] U.S. Code Cong. & Ad. News 4007.

^{8/} See 116 Cong. Rec. 35291 (remarks of Rep. Poff) (1970) ("[A] witness confined for civil contempt carries 'the keys of the prison in his own pocket.'").

^{9/} H.R. Rep. No. 91-1549, supra [1970], U.S. Code Cong. & Ad. News at 4008, 4022. 116 Cong. Rec. 588 (remarks of Sen. McClellan) (1970); id. 35196 (remarks of Rep. Cellar); id. 35200 (remarks of Rep. McCulloch); id. 35291 (remarks of Rep. Poff); id. 35304 (remarks of Rep. Railsback).

^{10/} See 116 Cong. Rec. 35304 (remarks of Rep. Railsback) (1970) ("Although it is possible that such authority might be subject to abuse, we are dealing with Federal judges and courts and the authority is limited.") (emphasis added).

In doing so, it could not have been intended to give Federal courts the power to interrupt prison sentences -- certainly state prison sentences -- because prior to the date of the Act, as far as the published cases indicate, no Federal court had ever interrupted the sentence of a recalcitrant witness. In fact, the only published case involving an already incarcerated witness held in contempt, Williams v. State, 125 Ark. 287, 290, 188 S.W. 826, 827 (1916), had held that a state court judge could not interrupt the sentence of such a witness, reasoning that "the court was without power to separate [the prisoner's sentence] into parts for the purpose of giving time to punish for other offenses." It is also worth noting that, at the time of the enactment of § 1826(a), it was generally accepted that the commencement of the execution of a sentence terminated a court's power to modify its order. See United States v. Liddy, 510 F.2d 669, 678 (D.C. Cir. 1974), cert. denied, 420 U.S. 980 (1975) (dissenting opinion). More importantly, it was a well-established general rule that "[T]he convict has a right to pay his debt to society by one continuous period of imprisonment." State ex rel. Libtz v. Coleman, 149 Fla. 28, 30, 5 So.2d 60, 61 (1941). This right was best explained in White v. Pearlman, 42 F.2d 788, 789 (10th Cir. 1930):

A prisoner has some rights. A sentence of five years means a continuous sentence, unless interrupted by escape, violation of parole, or some fault of the prisoner, and he cannot be required to serve it in installments. Certainly

a prisoner should have his chance to re-establish himself and live down his past. Yet, under the strict rule contended for by the warden, a prisoner sentenced to five years might be released in a year; picked up a year later to serve three months, and so on ad libitum, with the result that he is left without even a hope of beating his way back.

See also In re Jennings, 118 F. 479, 482 (C.C.E.D. Mo. 1902).

Other than cases of escape or parole violation -- cases where the prisoner is no longer incarcerated at all -- the only decision prior to the enactment of § 1826(a) that allowed a sentence already commenced to be interrupted for the service of another was McDonald v. Lee, 217 F.2d 619 (5th Cir. 1954), vacated as moot, 349 U.S. 948 (1955).

McDonald upheld the interruption of one Army court-martial sentence by another, stating that "In military court-martial proceedings . . . concurrent sentences have never been recognized." 217 F.2d at 622. It would not, therefore, be appropriate to extend McDonald beyond its unique court-martial setting.

Since the enactment of § 1826(a), seven decisions by six United States Court of Appeals (not including this Court) have held that a Federal court may interrupt the time of a recalcitrant witness who is a Federal prisoner. ^{11/}

^{11/} In re Grand Jury Investigation (Appeal of Hartzell), 542 F.2d 166 (3d Cir. 1976), cert. denied, 429 U.S. 1047 (1977); In re Grand Jury Proceedings (United States v. Thurmond), 534 F.2d 41 (5th Cir. 1976); In re Grand Jury Proceedings (United States v. Marshall), 532 F.2d 410 (5th Cir.), cert. denied, 429 U.S. 924 (1976); Martin v. United States, 517 F.2d 906 (8th Cir.), cert. denied, 423 U.S. 856 (1975); Williamson v. Saxbe, 513 F.2d 1309 (6th Cir. 1975); United States v. Liddy,

The fact that these cases involve Federal, rather than state, prisoners is an obvious and supremely important difference, but it is nevertheless instructive to parse them to ascertain the ground on which they rest. A close reading of the cases in this line that contain any analytic content at all^{12/} reveals that none of them even attempts to construe the language of § 1826(a). None of them interprets that statute as in and of itself authorizing the sentence interruption upheld. Rather, these cases proceed, with varying degrees of clarity, on either of two altogether different courses of reasoning. They collectively set forth the proposition that 18 U.S.C. § 3568, the Federal time credit statute, is by its own words tolled when a Federal prisoner is ordered confined for a different offense than that for which he was originally incarcerated. Most of these cases further note that the "law-and-order" Congress that enacted § 1826(a) would not have wished prisoners to be immune to the coercive

510 F.2d 669 (D.C. Cir. 1974), cert. denied, 420 U.S. 980 (1975); Anglin v. Johnston, 504 F.2d 1165 (7th Cir. 1974), cert. denied, 420 U.S. 962 (1975). Hartzell, Martin, and Liddy contain long and scholarly dissenting opinions.

^{12/}

Thurmond only cites the relevant previously decided cases and appends a brief quotation from Marshall. 534 F.2d at 42. Williamson, a per curiam opinion, merely states that Anglin is "squarely on point." 513 F.2d at 1310.

sanctions that may be applied to others and rest their holdings -- some explicitly and the rest implicitly -- on the Federal judiciary's inherent powers to correct this anomaly by altering the service of a Federal sentence for purposes of § 3568.^{13/}

^{13/}

Hartzell seems to hold that 18 U.S.C. § 3568 does not codify the common law rule that service of a sentence cannot be interrupted to punish a contemner and that "a civil confinement pursuant to § 1826 may interrupt a [Federal] sentence." 542 F.2d at 168-69. It states that "[i]t seems highly unlikely that Congress intended prisoners to be in an exempt category," but seems to reason not that § 1826 itself takes prisoners out of such a category but that consistency required that the court exercise its inherent powers to achieve this result. 542 F.2d at 169. Marshall simply notes that "[t]o credit time in prison for contempt toward a pre-existing sentence would altogether vitiate the intended coercive incentive to testify." It does not even mention § 1826(a) itself as a possible justification for the Order in question. Martin notes that it is "unlikely that Congress, had it considered the problem, would have intended to immunize incarcerated witnesses from the coercive sanction of § 1826(a)." 517 F.2d at 908. It does not, however, attempt to arrive at this conclusion from the language of § 1826(a). Rather, it relies on the language of § 3568 in holding that a Federal contemner's time is, for purposes of that statute, necessarily interrupted. 517 F.2d at 909. Liddy, again, does not attempt to arrive at its result by parsing § 1826(a), but, rather, expressly arrives at its conclusion by discussing a Federal court's inherent power to interrupt a Federal prisoner's sentence for purposes of § 3568. Anglin was not an appeal from the contempt order in question but came up on a petition for a writ of habeas corpus praying for credit under § 3568 for the time the petitioner spent in prison while in contempt of court. The court acknowledged that § 1826(a) "is silent as to the effect of . . . confinement [under it] upon pending criminal sentences," 504 F.2d at 1167, and rests exclusively on the court's construction of § 3568, id. at 1167-69.

This line of cases is not notable for exceptional clarity of analysis and seems quite inconsistent with the reasoning of the Supreme Court in United States v. Wilson, 421 U.S. 309, 317 n.9 (1975), discussed in n.6 supra. In any event, these decisions are not binding on this Court. But even if these cases are taken as correct in their result, they can only be interpreted as speaking to the effect of a § 1826(a) confinement on 18 U.S.C. § 3568 and as describing the inherent power of the Federal judiciary over the sentences being served by Federal prisoners. Neither consideration, of course, is at issue here. These decisions do not, as we read them, expand § 1826(a) itself one iota -- that statute authorizes "confinement" and nothing more. At the risk of belaboring the point, the Substitute Order does something entirely different from the action envisioned and authorized by § 1826(a).^{14/} It must draw its justification from another source.

^{14/}

We should note at least the theoretical possibility that, if the District Court had merely ordered Mr. Liberatore to be "confined" without any instruction as to the effect of such confinement on his current sentence, the Connecticut State Department of Correction might have chosen to interrupt his sentence for the duration of the contempt citation. Such an interruption would not be sanctioned by the Connecticut General Statutes, which contain no close analogue to 18 U.S.C. § 3568. Conn. Gen. Stat. § 53a-38(b) merely provides that

2. Other statutes.

No statute other than 28 U.S.C. § 1826(a) offers any conceivable authority for the Substitute Order. The most relevant remaining statute is 28 U.S.C. § 2241(c)(5) which allows a Federal court to extend a writ of habeas corpus to a prisoner when "[i]t is necessary to bring him into court to testify or for trial." This provision cannot be construed as authorizing any action other than the physical transportation of the prisoner "into court." No alteration of a pre-existing sentence is even remotely contemplated by this statute. In fact, it now appears settled that, in the analogous case of a writ of habeas corpus ad prosequendum issued under this authority, the time of the prisoner brought to court continues to run. Such a writ is a detainer for purposes of the Interstate Agreement on Detainers, see 18 U.S.C. App. § 2 and Conn. Gen. Stat. § 54-186,^{15/} and Art. V(f) of the Agreement expressly provides that "During the continuance of temporary custody . . . time being served on

that "A definite sentence of imprisonment commences when the prisoner is received in the custody to which he was sentenced." The only provision authorizing the interruption of a sentence is § 53a-38(d), and that section applies exclusively to the case of an escape. In any event, an interruption by the Department of Correction is hypothetical at best and could be appealed to the Connecticut state courts. The problems raised by a Federal court's order to so interrupt are quite different from those raised by an exclusively intra-Connecticut decision.

^{15/}

United States v. Cyphers, 556 F.2d 630 (2d Cir. 1977); United States v. Ford, 550 F.2d 732 (2d Cir. 1977); United States v. Mauro, 544 F.2d 588 (2d Cir. 1976).

the sentence shall continue to run"

It should, in any event, be unnecessary to comb the United States Code for statutory language that can, by some hitherto unimagined legerdermain, be stretched to apply to an alteration of a state prison sentence by a Federal court for which no precedent can be found. The adjustment between the power of the Federal judiciary and a state's administration and execution of its own laws -- particularly its criminal laws -- is a peculiarly delicate one. For this reason, Congress has, historically, been careful to limit its authorization of judicial intrusion into this area to a few carefully selected and well-known provisions -- e.g., 28 U.S.C. §§ 1341, 1342, 2241, 2283, and 2284. See Stefanelli v. Minard, 342 U.S. 117, 120 (1951). If the authority for the Substitute Order cannot be readily gleaned from one of these enactments, none of which has ever in their long history been construed as allowing a judicial action remotely like it, there is, we think, sound reason to doubt the validity of the Order. Unless some justification for the Order can be found in the inherent powers of the Federal judiciary, the Order must be -- in a quite literal sense -- lawless.

B. The Substitute Order Cannot Be Justified
By the Inherent Powers of the Federal
Judiciary.

The cases cited in n.11, supra, in the uncertain event

that they represent wise policy or good law at all, indicate that a Federal court has the inherent power to alter a sentence being served by a Federal prisoner to coerce that prisoner's compliance with a court order. The vices and virtues of this doctrine, such as they are, are quite different from the vices and virtues of the proposition that a Federal court has the inherent power to alter the service of a lawful sentence that has been pronounced by a state court and the service of which has commenced. See Rizzo v. Goode, 423 U.S. 362, 379/ (1976) ("When the frame of reference moves from a unitary court system . . . to a system of federal courts representing the Nation, subsisting side by side with 50 state judicial, legislative, and executive branches, appropriate consideration must be given to principles of federalism. . ."). The former doctrine merely involves what might, by way of comparison, be called a "housekeeping" matter within the Federal judiciary -- i.e., the extent to which a Federal court will recognize as mutable a sentence previously given either by itself or, perhaps, by another Federal court. ^{16/} The latter proposition is, with all respect, infinitely more radical. It would allow one sovereign within our Federal system to alter the final judgement of another sovereign

^{16/}

All of the cases cited in n.11, supra, with the exception of Williamson and, possibly, Thurmond (the facts of which are unclear), involved a contempt order given by the same court that pronounced the sentence interrupted by the order in question.

when the legality of that judgement is unquestioned and the practical considerations inspiring the alteration are not ones of necessity at all, but merely of relative convenience.

This theorem is so novel and so utterly without discoverable precedent that it necessarily takes us into uncharted areas of the law. It requires an analysis of the restraints that the Federal judiciary has traditionally imposed upon itself when dealing with the states and, beyond that, of the limits of the Supremacy Clause and of the very nature of our Federal system as they relate to the problems at hand. Fortunately, the larger problems invoked by the instant case have been analyzed and debated throughout our national experience, and we are not without well-established judicial landmarks to which we may refer.

It is well settled that there are limits to the power that a Federal court may exercise against a state prisoner. The Supreme Court expressly stated in Ex parte Dorr, 44 U.S. (3 How.) 103, 105 (1845), that "As the law now stands, an individual, who may be indicted in a Circuit Court for treason against the United States, is beyond the power of federal courts and judges, if he be in custody under the authority of a state." The rationale for this doctrine was succinctly stated by the Court in Taylor v. Taintor, 83 U.S. (16 Wall.) 366, 370 (1873):

Where a State court and a court of the United States may each take jurisdiction the tribunal which first gets it holds it to the exclusion of the other, until its

duty is fully performed and the jurisdiction invoked is exhausted: and this rule applies alike in both civil and criminal cases. It is indeed a principle of universal jurisprudence that where jurisdiction has attached to a person or thing, it is -- unless there is some provision to the contrary -- exclusive in effect until it has wrought its function.

The Court cited four cases in support of this proposition. Taylor v. Carryl, 61 U.S. (20 How.) 583 (1858); Hagan v. Lucas, 35 U.S. (10 Pet.) 400 (1836); Ex parte Jenkins, 13 F.Cas. 445 (C.C.E.D. Pa. 1853) (No. 7,259); In re Troutman, 21 N.J.L. 634 (1854). The two Supreme Court cases are worth particular consideration for the light they shed on the respect either a state or a Federal court must show to the final judgements of the other.

Hagan, the first case in the series, involved the plaintiff's (Hagan's) action against Bynum and McDade for a sum of money in Federal court. An execution was issued against the defendants' property, which was levied on certain slaves owned by Lucas. Lucas had previously obtained the slaves by a judgement obtained against Bynum and McDade in a state court. The Court held that Lucas was entitled to retain the slaves, reasoning that:

Had the property remained in the possession of the sheriff under the first levy, it is clear the marshal could not have taken it in execution; for the property could not be subject to two jurisdictions at the same time. The first levy, whether it were made under the federal or state authority, withdraws the property from the reach of the process of the other.

.
A most injurious conflict of jurisdiction would be likely, often, to arise between the federal and the state courts, if the final process of the one could be levied on property which had been taken by process of the other.

35 U.S. (10 Pet.) at 403.

Taylor v. Carryl involved an action of replevin in the Supreme Court of Pennsylvania for the barque Royal Saxon. The barque, which had arrived at the port of Philadelphia on a trading voyage, was seized by the sheriff of Philadelphia County on a writ of foreign attachment from the Supreme Court. The creditors obtained an order of sale, and the barque was sold to Carryl's decedent. While the motion for sale was pending, the seamen on board the barque filed a libel in Federal court for wages due them. On the same day, the marshal attached the ship, even though he found a sheriff's officer on board. In this case, unlike Hagan, the subsequent Federal action was not only of a different nature than the first action but, since it was in admiralty, was within the exclusive jurisdiction of the Federal court. The Supreme Court, nevertheless, held that Carryl was entitled to the barque. Mr. Justice Campbell, writing for the Court, extensively quoted from Hagan and also noted:

The legislation of Congress, in organizing the judicial powers of the United States, exhibits much circumspection in avoiding occasions for

placing the tribunals of the States and of the Union in any collision. A limited number of cases exist, in which a party sued in a State court may obtain the transfer of the cause to a court of the United States, by an application to the State court in which it was commenced; and this court, in a few well-defined cases, by the twenty-fifth section of the judiciary act of 1789, may revise the judgement of the tribunal of last resort of a State. In all other respects the tribunals of the State and the Union are independent of one another.

61 U.S. (20 How.) at 597.

These cases were reaffirmed in Covell v. Heyman, 111 U.S. 176 (1884). Covell, a United States marshal, had possession of certain property by virtue of levy under a writ of execution issued upon a judgement recovered in Federal court. The Supreme Court held that Heyman, allegedly the rightful owner, could not subsequently bring an action of replevin in a state court. Mr. Justice Matthews reasoned for the Court, in language strikingly relevant to the instant case, as follows:

The forbearance which courts of coordinate jurisdiction, administered under a single system, exercise towards each other, whereby conflicts are avoided, by avoiding interference with the process of each other, is a principle of comity, with perhaps no higher sanction than the utility which comes from concord; but between State courts and those of the United States, it is something more. It is a principle of right and of law, and therefore, of necessity. It leaves nothing to discretion or mere convenience. These courts do not belong to the same system,

so far as their jurisdiction is concurrent; and although they co-exist in the same space, they are independent, and have no common superior. They exercise jurisdiction, it is true, within the same territory, but not in the same plane; and when one takes into its jurisdiction a specific thing, that res is as much withdrawn from the judicial power of the other, as if it had been carried physically into a different territorial sovereignty. To attempt to seize it by a foreign process is futile and void.

111 U.S. at 182.

Although the cases just discussed concerned property, the Supreme Court left no doubt that the same principle applies to jurisdiction over persons in criminal cases in Ableman v. Booth, 62 U.S. (21 How.) 506 (1859), and Tarble's Case, 80 U.S. (13 Wall.) 397 (1872). Both Ableman and Tarble's Case were quoted from, and relied upon, in Covell.

These considerations were again raised in Ponzi v. Fessenden, 258 U.S. 254 (1922). Ponzi held, against the objections of a Federal prisoner, that The Attorney General could voluntarily turn the prisoner over to a state court for trial on indictments that had been returned against him. In so holding, the court was careful to note that this "loan" would in no way disturb the prisoner's pre-existing sentence. Chief Justice Taft, writing for the Court stated, "Nor . . . is there any difficulty in respect to the execution

of a second sentence. It can be made to commence when the first terminates." 258 U.S. at 265. This qualification was necessary to avoid the conflict between state and Federal courts that would otherwise occur.^{17/}

These decisions are by now very old, and the doctrine announced in them has been so often announced, so confidently relied upon, so long continued, that it has surely passed the limits of disturbance by lower Federal Courts. Whether these decisions are construed as formulating restraints that the Federal judiciary should as a matter of comity impose upon itself or restraints that are required by the very nature of our constitutional system of government -- Justice Matthews' statement in Covell indicates that the latter is the case -- they necessarily mark an important boundary to the reach of the Supremacy Clause.

^{17/}

It is instructive to note that even in the case of the prisoner who serves a state prison sentence after he has been given a Federal prison sentence but before the service of the latter sentence has actually commenced, Federal courts have not allowed the state sentence to postpone or in any way affect service of the Federal sentence for time computation purposes. United States v. Croft, 450 F.2d 1094 (6th Cir. 1971); Smith v. Swope, 91 F.2d 260 (9th Cir. 1937); Gilman v. Saxby [sic], 392 F. Supp. 1070 (D. Hawaii 1975). Contra, Zerbst v. McPike, 97 F.2d 253 (5th Cir. 1938); United States v. Marrin, 227 F. 314 (E.D. Pa. 1915). But cf. Culotta v. Pickett, 506 F.2d 1061 (7th Cir. 1974) (prisoner held on state charges of which he was not ultimately convicted).

This doctrine is, moreover, a profoundly wise principle rather than an archaic formalism. One need not side with Calhoun against Webster or ignore the result of the Civil War to recognize the Calhoun perceived something very close to the essence of our Federal structure when he spoke of the Union as "this beautiful structure, this harmonious aggregate of States, produced by the joint consent of all."^{18/} The doctrine that the Federal government -- and particularly the Federal judiciary -- cannot under the guise of the Supremacy Clause upset the balance of this structure by interfering with lawful actions made by the states under their residuary powers is as old as The Federalist.^{19/} It has, furthermore, been reinforced by the Supreme Court in a series of cases of exceedingly recent vintage. National League of Cities v. Usery, 426 U.S. 833 (1976); Rizzo v. Goode, 423 U.S. 362 (1976); Younger v. Harris, 401 U.S. 37

^{18/} 9 Register of Debates in Congress 539 (1833) (remarks of Sen. Calhoun).

^{19/} See especially The Federalist No. 33 (A. Hamilton) (Modern Library Edition at 201-02) ["But it will not follow from this doctrine [of the Supremacy Clause] that acts of the larger society which are not pursuant to its constitutional power, but which are invasions of the residuary authorities of the smaller societies, will become the supreme law of the land. These will be merely acts of usurpation and will deserve to be treated as such."]. See also The Federalist No. 82 (A. Hamilton).

(1971). These latter cases establish not only that there are limits on the inherent Federal power to infringe on the final, lawful judgments of state authority, a proposition expressly embodied in the Tenth Amendment, but that one manifestation of these limits is "a system in which . . . the National Government, anxious through it may be to vindicate and protect federal rights and federal interests, always endeavors to do so in ways that will not unduly interfere with the legitimate activities of the States." Younger v. Harris, supra, 401 U.S. at 44.

The precaution expressed in Younger brings us to our final point. The line of cases from Hagan v. Lucas to Covell v. Heyman firmly establishes, we think, that if a state court has sentenced a prisoner to a prison term and the legality of that sentence is unquestioned, a Federal court has no inherent power to alter the service of that state sentence by an iota. But even if this seemingly absolute rule admits of exception, such an exception would be appropriate only in a case in which a Federal court had an absolute, unequivocal necessity to alter the state sentence in question. If there are any alternatives -- no matter how cumbersome or relatively inefficient -- our Federal system requires that they be used.

There are at least two alternatives in the instant case. First, the very fact that the District Court in its initial Order of June 29 committed Liberatore to the custody of

The Attorney General until the expiration of the term of the Grand Jury on April 13, 1978, or until he should purge himself of his Contempt, is not without its likely coercive effects. The most obvious is that, were it not for this Order, Liberatore would be released from the custody of the State Department of Correction in January of 1978, assuming all good time. Consequently, the Court's original Order, in and of itself, required him to remain incarcerated for a period of almost three additional months. This is no inconsiderable time, and it is altogether possible that Liberatore would find the Court's initial Order that he be "confined" to be truly coercive well before the end of the Grand Jury's term. It is also important to note that, were it not for the Substitute Order, Liberatore might hope to be released from his confinement by the state by a reduction of his sentence pursuant to Conn. Gen Stat. § 53a-39.^{20/} The Substitute Order, however, makes this possibility of only

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Conn. Gen. Stat. § 53a-39 provides that "At any time during the period of a definite sentence, the sentencing court judge may, after hearing and for good cause shown, reduce the sentence, order the defendant discharged, or the defendant discharged on probation or conditional discharge for a period not to exceed that to which he could have been originally sentenced."

academic interest, and this consequence, too, is not without its coercive effects.

Alternatively, the District Court could have punished Liberatore's disobedience through a prosecution for criminal contempt pursuant to 18 U.S.C. § 401.^{21/} § 401 has, of course, traditionally been viewed as a punitive, rather than a coercive, instrument. But a perceived threat that such a prosecution might be made and result in a consecutive prison sentence would, in fact, be coercive and would have none of the manifold legal and constitutional problems presented by the Substitute Order.

Because these alternatives -- however unsatisfactory -- exist, the Substitute Order cannot be valid. It may seem in some sense unfair that a state prisoner should be relatively immune from the coercive power of a civil commitment for contempt, but that immunity, such as it is, is a simple result of the fact that such a commitment is not by its nature a suitable device for such a person. For the District Court

^{21/} 18 U.S.C. § 401 provides that:

A court of the United States shall have power to punish by fine or imprisonment, at its discretion, such contempt of its authority, and none other, as --

. . . .

(3) Disobedience or resistance to its lawful writ, process, order, rule, decree, or command.

to go beyond an Order of "confinement" -- to alter the service of a lawful, pre-existing state sentence, in the teeth of a long-established doctrine that it had no power to do so -- not out of necessity but for mere convenience, is hardly consonant with the restraint that our Federal system requires of the Federal judiciary. Fifty years ago, Mr. Justice Holmes, with his usual insight, said it best. "The relation of the United States and the Courts of the United States to the States and the Courts of the States is a very delicate matter that has occupied the thoughts of statemen and judges for a hundred years and can not be disposed of by a summary statement that justice requires me to cut red tape and intervene." 5 The Sacco-Vanzetti Case, Transcript of the Record 5516 (1929) (Memorandum of August 20, 1927).

II. THE WITNESS WAS NOT GIVEN THE DUE
PROCESS SAFEGUARDS OF NOTICE AND
OPPORTUNITY TO PREPARE A DEFENSE
AS REQUIRED BY FED. R. CRIM. P. 42
AND THE FIRST AND SIXTH AMENDMENTS
TO THE CONSTITUTION.

A habeas corpus ad testificandum was issued by Judge T. Emmet Clarie on June 14, 1977, ordering a state prisoner, Thomas A. Liberatore, to appear before the grand jury then sitting in Hartford, Connecticut, on June 29, 1977, for the purpose of giving major case prints and handwriting exemplars. The witness Liberatore appeared before the grand jury and, without the assistance of counsel, refused to give either the case prints or the handwriting exemplars. Because he was indigent, a public defender was then appointed to represent him.

Upon notification that Liberatore would continue to refuse to give the requested information, the Assistant United States Attorney filed an application, with an affidavit attached (A. 25), that the witness be held in contempt because of his refusal to comply. On that same day, and almost immediately after notification of Liberatore's refusal to comply, the witness was taken before Judge Clarie and ordered by the court to provide the prints and handwriting samples or be held in contempt.

The witness again, through his counsel, informed the court that he would still refuse to provide the documents

sought by the grand jury. The court then held a brief hearing in which the prosecutor and the grand jury foreman asserted that the prints and samples were essential (A. 10, 12). When defense counsel tried to question the witness as to the bases for his belief that the sought-after information was essential and relevant, the government's objection was sustained (A. 12-15). Upon informing the court that he would continue to refuse to give the grand jury fingerprints and a handwriting exemplar, he was held in contempt by the court (A. 22-23).

Although § 1826 is a civil remedy, its purpose is to coerce by incarceration recalcitrant witnesses, and it operates similarly to a criminal sentencing statute. Whether a contempt citation is deemed civil or criminal, the burden of imprisonment is just as great, and consequently, the same due process safeguards should apply. In re DiBella, 518 F.2d 955, 959 (2d Cir. 1975). In this respect, the statute has been held to be quasi-criminal. Harris v. United States, 382 U.S. 162 (1965); In re Sadin, 509 F.2d 1252 (2d Cir. 1975). For this reason, this Circuit has held § 1826 hearings must comply with the notice and adequate preparation requirements of Fed. R. Crim. P. 42(b).^{22/} Sadin, supra;

^{22/}

"(b) Disposition Upon Notice and Hearing.

A criminal contempt except as provided in subdivision (a) of this rule shall be prosecuted on notice. The notice shall state the time and place of hearing, allowing a reasonable time for preparation of the defense and shall state the essential facts constituting the criminal contempt charge and describe it as such" Fed. R. Crim. P. 42(b).

at 1255; see also United States v. Hawkins, 501 F.2d 1029 (9th Cir. 1974), cert. denied, 95 S. Ct. 668; and In re Grand Jury Investigation (Bruno), 545 F.2d 385 (3d Cir. 1976). The purpose of the "reasonable time for preparation" provision of Rule 42(b) is to assure the witness and his counsel adequate time to prepare a defense and to show "just cause" why the witness should not be held in contempt. Sadin, supra at 1255; In re DiBella, supra at 959; United States v. Boe, 491 F.2d 970 (8th Cir. 1974); In re Bruno, supra.

Although the amount of notice actually required is left to the discretion of the court and may vary depending upon the possible defenses that could conceivably be raised, no appellate court has found the summary procedures afforded Liberatore to be sufficient due process or compliance with Rule 42(b). Cf. United States v. Handler, 476 F.2d 709 (2d Cir. 1973) (application for contempt on November 22, hearing on November 29); Sadin, supra (2 days' notice before court gave reconsideration hearing). Clearly a witness must be given a meaningful opportunity to present his defense at a hearing under 28 U.S.C. § 1826. In re Bianchi, 542 F.2d 98, 101 (1st Cir. 1976); In re Vigorito, 499 F.2d 1351, 1353 (2d Cir. 1974); In re Bruno, supra at 388-389.

If Liberatore's counsel were given a day to prepare, the witness may have been able to show "just cause" for his recalcitrance by presenting some evidence that the handwriting sought was the product of an illegal wiretap, was beyond the

scope of the grand jury, involved matters which pertained to an already existing indictment, or that the grand jury and prosecutor were merely engaged in a fishing expedition. It is immaterial that he might not have successfully raised any of the these defenses, since he should have been afforded an adequate opportunity and time to attempt to litigate them. In re Bruno, supra at 388. Considering the nine months still remaining to the grand jury in June, 1977, there would have been little prejudice to the government by a short continuance affording counsel and the witness adequate time to show "just cause." 28 U.S.C. § 1826.^{23/} The court's restrictions on Liberatore's questioning of the witness prevented him from obtaining the "uninhibited adversary hearing" or necessity and relevance to which he was entitled. United States v. Dinsio, 468 F.2d 1394 (9th Cir. 1972).

The United States Attorney's objection to probing the secret deliberations of the grand jury are not well

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In fact one court has even gone as far as to require that the five-day notice rule of Fed. R. Crim. P. 45(d) apply in a civil contempt hearing if there is an "indication of the necessity of an evidentiary hearing" or when complex legal issues are involved. United States v. Alter, 482 F.2d 1016, 1023 (9th Cir. 1973). Clearly the need for an evidentiary hearing was even recognized by the District Court by virtue of his allowing Liberatore's counsel to cross-examine the grand jury foreman. The witness further maintains that the legal issues raised in sections one and three are indeed complex and an adequate time to prepare for argument before the District Court should have been permitted. In any event, the amount of notice required should never be less than one day. United States v. Hawkins, supra 501 F.2d at 1031.

founded (A. 12-13). The court could have allowed a few foundational questions to determine if other evidence so overwhelmingly linked Liberatore to the stolen checks that fingerprints and handwriting were unnecessary. Alternatively, the same line of questioning may have demonstrated to the court that the grand jury did not have the slightest belief or even hunch that Liberatore was involved with the two checks in question. As the Ninth Circuit has stated "... modest breaches of grand jury secrecy may well be required when non-disclosure would defeat fundamental constitutional rights, including the right to due process of law." (citations omitted) United States v. Dinsio, supra at 1394; United States v. Alter, supra at 1023. The government should not have been required to reveal its full case through Liberatore's probing of the foreman, but "enough to show that the [grand jury] proceeding was not pure fishing or harassment." United States v. Dinsio, supra at 1394-1395 (Chambers, J. concurring).

III. THE GOVERNMENT FAILED TO DEMONSTRATE
THE NECESSITY AND RELEVANCE OF THE
FINGERPRINTS AND HANDWRITING EXEMPLARS
SOUGHT BY THE GRAND JURY.

Before a witness may be ordered to turn over handwriting exemplars or fingerprints, the government must demonstrate that the information sought is necessary and relevant to some on-going criminal investigation. United States v. Schofield, 507 F.2d 963 (3d Cir.), cert. denied, 426 U.S. 1015 (1975).

"The grand jury must have a foundational showing that the exemplars have some relevance to the investigation that it is conducting. Dinsio cannot be expected to demonstrate just cause in a vacuum" United States v. Dinsio, supra at 1392, 1394.

Simply submitting an affidavit stating the grand jury is investigating the circumstances surrounding the stealing of two checks does not establish the relevance of Liberatore's handwriting or prints. The lack of a showing of relevance is not altered by the grand jury foreman's conclusory testimony that he believes the sought-after information would be relevant to the grand jury inquiry.

While the Third Circuit has held that the affidavit used in the instant case is adequate to satisfy the relevancy requirement even that court felt that the "District Court could have required something more of the government." United States v. Schofield, supra 507 F.2d at 965.^{24/} If the Assistant United States Attorney felt that the release of more specific information would have jeopardized the secrecy of the grand jury and allowed impermissible discovery, he could, at the very least, have submitted an in camera affidavit to the court. E.g., Hawthorne v. Director of Internal Revenue, 406 F. Supp. 1098 (E.D. Pa. 1976).

Nothing in the record beyond the conclusory statements of the foreman could have possibly shown the court either the

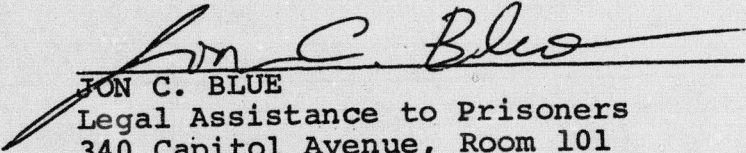
^{24/} Furthermore, it appears that the District Court in Schofield had knowledge of the subject matter of the grand jury investigation. United States v. Schofield, supra at 965.

the necessity of the prints and handwriting or that the information sought was not "pure fishing or harassing" by the government. United States v. Dinsio, supra 468 F.2d at 1394-1395.

CONCLUSION

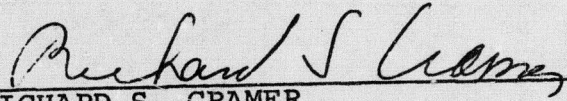
For the aforesaid reasons, the August 2, 1977, Order of the District Court for the District of Connecticut should be held invalid, or in the alternative, the case should be remanded to the District Court for the purpose of affording the contemner a summary evidentiary hearing consistent with Due Process and Fed. R. Crim. P. 42(b).

Respectfully submitted,


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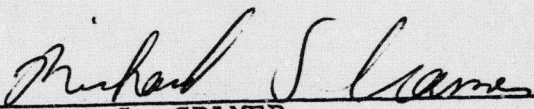
Dated:
September 23, 1977


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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that one copy of the foregoing Brief and Appendix for Appellant Thomas A. Liberatore was hand-delivered to the office of Thomas P. Smith, Esq., Assistant United States Attorney, 450 Main Street, Hartford, Connecticut 06103, and one copy was mailed, postage prepaid, to Hugh W. Cuthbertson, Esq., Assistant United States Attorney, Post Office Box 1824, New Haven, Connecticut 06508, this 23d day of September, 1977.



RICHARD S. CRAMER
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